10-11-07

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PATENT APPLICATION
Attorney Docket No.: 13.001.CON

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of:	Jeff Abel	
Serial No.:	10/616,460	
Filed:	7/08/2003	Art Unit 3643
For:	FISH NET WITH LENGTH MEASURING SCALE	
Examiner:	David Parsley	

APPELLANT'S REPLY BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

On September 11, 2006 Appellant filed a timely Notice of Appeal from the action of the Examiner, mailed June 22, 2006, finally rejecting all of the claims in this application. On November 9, 2006, Appellant timely filed an appeal Brief, filed an Amended Appeal Brief on December 11, 2006, and filed a Second Amended Appeal Brief on March 27, 2007.

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Reg. No. 42,868

APPELLANT'S REPLY BRIEF

This Reply Brief is being filed respondent to the Examiner's Answer (hereinafter "Answer"), mailed on August 20, 2007. For the reasons presented below, the Appellant requests that the Board overturn the Examiner's rejections and allow all pending claims. The following discussion will focus on the statements made in the Response to Argument section of the Examiner's Answer.

1. The Examiner's Rejections Over Chat are Faulty.

The Examiners rejections over Chat (French Patent FR 2582190) are almost uniformly based upon false statements, illogic, misreading of the claims, or interpretations of the claims that are inconsistent with the specification of the instant application.

A. Chat Does Not Disclose a Flexible Length Measuring Scale.

With respect to independent claims 1, 14 and 18, contrary to the Examiner's arguments in the Examiner's Answer, Chat does not teach or suggest a flexible length measuring scale. The Examiner has now for the first time provided a complete translation of the Chat reference. The Appellant has reviewed this reference in its entirety, and can find no teaching or suggestion anywhere in Chat that indicates that the measuring scale or the trough or gutter upon which it is disposed are or can be flexible and still be functional.

The Applicant's claims, on the other hand, specify a flexible length measuring scale. The Examiner's statement that "appellant does not specifically state that the measuring scale is made of a flexible material" (Answer, p. 9) is simply false. Evidently the Examiner has not read the claims carefully. Claim 1 specifically recites "a flexible length measuring scale". Claim 1, ln. 5. Independent claims 14 and 18 include the same language. The Appellant is at a loss to understand how the recitation of "a flexible length measuring scale" can be construed not to

indicate that the measuring scale is made of a flexible material.

The Examiner persists in making the argument that the measuring scale of Chat is necessarily flexible because it is connected with flexible connectors. See Answer, p. 9-10. This argument is brazenly illogical. Under this sort of faulty reasoning, the Examiner could call the most inflexible material in the universe flexible if it were connected to some other structure with a flexible cord. As stated before, the characteristics of a connector between two structures do not thereby transfer those characteristics to the structures that are connected. In the Appellant's claims, it is the measuring scale that is flexible. No connectors are claimed. The possible or hypothetical characteristics of such connectors are simply irrelevant.

In support of his claim that the connectors of the trough of Chat are part of the length measuring scale, the Examiner further argues that the Appellant's invention includes non-measuring structure as part of the measuring scale because "portions of material not including the markings cannot perform the function of measuring but are part of appellant's measuring scale." Answer, p. 10. This reasoning is faulty because the Examiner is importing elements into the claims that are not there. The claims do not recite any portion of the measuring scale that does not perform the function of measuring. Thus the Examiner is justifying an argument against the claims based upon something that is not in the claims.

B. Chat Itself Does Not Disclose A Net Having A Frame.

The Examiner's argument that a frame is implicit in Chat is belied by the Examiner's own mention of the Bryant reference when making that argument. See Answer, p. 10. Chat does not mention a frame. The Examiner has stated that the term "landing net . . . is a term well known in the art" (Answer, p. 10). Even if the Examiner's unsupported assertion on this score is accepted, the mention of Bryant amounts to a concession that the Examiner's rejection for

anticipation over Chat under 35 U.S.C. § 102 on this ground is improper because the cited reference obviously does not teach each and every element of the claimed invention and requires the combination with subject matter from other references to do so.

C. *Chat Does Not Disclose Modified Units of Length that can Compensate for Lengthwise Curvature of a Fish.*

Regarding claim 4, the Examiner has stated that "Chat has length markings . . . which are used to measure the fish and the curvature of the fish body." Answer p. 10. This statement is false and indicates that the Examiner is interpreting the claim language contrary to the specification. Claim 4 recites "length markings representing modified units of length to compensate for curvature of the fish and the length measuring scale." As FIG. 3 and the accompanying text of the present application clearly indicate, the curvature of a fish held in the net 14 of the Appellant's application has reference to lengthwise curvature of the fish, as indicated by the long axis 54. It does not relate to curvature around the girth of a fish – which is the only type of curvature that the shape of the gutter of Chat could address.

The Appellant cannot find, and the Examiner has not pointed out, any portion of Chat that actually teaches or suggests compensation for lengthwise curvature of a fish. The length markings of Chat are simply incapable of compensating for lengthwise curvature of a fish body because they are disposed in a straight line on a rigid trough. Since compensation for lengthwise curvature of a fish is not mentioned in Chat and the structure of that device is incapable of compensating for curvature in the manner claimed, there is thus no basis for this rejection.

With respect to the term "modified units of length", the Examiner's arguments demonstrate that the Examiner is interpreting the claim language contrary to the specification. The term "modified units of length" is not a term that has a definite and single accepted meaning

in the art to which this invention relates. Accordingly, reference must be had to the specification to determine the meaning of this term. As noted previously, the term "modified units of length" as used in the instant patent application has reference to the space between length markings, not the direction of the scale, as in Chat. The specification states that modified units of length can include markings wherein the space between adjacent markings is greater than a standard unit of measurement, for example, or is non-linear, such as "a graduated or semi-logarithmic scale" in which the "distance between length markings gradually increases" with distance from a reference point. (Page 6, ln. 10-16). There is no teaching or suggestion in Chat to use units that are modified in any of these ways.

D. Chat Does Not Disclose a Length Measuring Scale That is Visible on Both Sides of a Net.

With respect to claims 22 and 23, the Examiner's Answer again demonstrates that the Examiner is interpreting the claims without reference to the specification. Claims 22 and 23 specify that "the length measuring scale is visible on opposing sides of the net." The Examiner's argument appears to be that the length markings on the trough of Chat can be seen when one views the trough from either end of the trough – the point of view thereby being from a different region or "side" of the net.

This argument is not consistent with the clear intent of the term "side" as the Appellant has used it. The specification states that the configuration of the length markings:

> allows the markings and numerals to be visible on both sides of the net fabric, and makes the measuring scale equally useful regardless of whether a user inverts the net from a given orientation. However, it will be apparent that the numerals will present a mirror image when viewed on one side, when compared to the other.

Specification, p. 8 ln. 2-8. This language clearly indicates that the Appellant's use of the term "side" has to do with a face of the net fabric, not merely some other region or "side" of one face of the fabric. Otherwise, the statement that "the numerals will present a mirror image" when viewed from a different "side" would not make sense.

Furthermore, the Examiner's argument ingores language in the claims themselves that requires functionality that the Chat device cannot provide. Claims 22 and 23 specify that the markings are visible on both sides of the net in order to allow the scale to be useful when the net is "in an inverted configuration with respect to the frame." The device of Chat would be non-functional if its net were inverted, and the markings would likewise not be visible at all. In Chat, since the markings are on the gutter and not the net fabric, they are not visible on both sides of the net fabric within the meaning of the Appellant's claims.

2. The Subject Matter Of the Claims Would Not Have Been Obvious Over Chat In View Of Bryant or Caddis.

A. The Examiner is not Comparing Corresponding Elements of the References.

With respect to the Bryant reference, the Examiner's Answer first attempts to rebut an argument that the Appellant did not make. The Examiner seems to be under the mistaken impression that the Appellant has argued that Bryant is non-analogous art. See Answer, p. 11. This is incorrect. Rather, the Appellant's argument is that the Examiner has compared non-analogous *portions* of the device disclosed in Bryant with elements of the Appellant's claims. In other words, the Examiner is not comparing corresponding elements as required.

The Appellant's independent claims all refer to the apparatus as a whole as a "fish net device," which includes a "net" element that is distinct from the device as a whole. The Examiner's repeated statements that Bryant discloses a length measuring scale disposed on the

net are false because the claim language has reference to the "net" element of the claimed device, not the net device as a whole. Bryant includes a length measuring scale, but this scale is not disposed on the net element of the device, but on the handle, which is part of the frame of that net device. When the different elements of the Appellant's invention are properly understood in this way and compared to the corresponding elements of the cited art, it becomes clear that the claimed elements are simply not provided by any combination of the cited references.

B. The Combination of Bryant With Chat Does Not Suggest a Measuring Scale that Extends from One Side of the Net to the Other.

With respect to claims 6 and 14, the Examiner's arguments ignore the actual language of the claims and are also inconsistent with the meaning of the claim language when interpreted in light of the specification. In the Answer, the Examiner stated that "the measuring scale of Chat – at A extends from one side of the net to the other" and that "Appellant argues that the scale – at A of Chat does not extend to the ends of the net, but as seen in claims 6 and 14 appellant does not use the term 'ends' but uses the term 'sides'." Answer, p. 12.

The Examiner apparently has not read the claims carefully. Claims 6 and 14 do not claim a measuring scale extending from one "side" of the net to the other. These claims specify that "the length measuring scale extends from one side of the closed loop to the opposing side." Claim 6 ln. 2-3. The term "closed loop" refers to the frame of the net device, not to the flexible net bag. See Specification, p. 4 ln. 26-29. Consequently, since no frame is shown or discussed in Chat, the corresponding structure simply does not exist for comparison.

Furthermore, with respect to the Examiner's combination of Chat and Bryant, the Examiner's statements are simply false because the Examiner is not comparing corresponding elements, as discussed above. The Examiner has asserted that the measuring scale of Bryant "is

attached directly on the net." Answer, p. 12. This is false. Bryant includes a length measuring scale 100, but this scale is not disposed directly on the net element 28 of the device, but on the handle 22, which is part of the frame of that net device. The Examiner is comparing the Bryant device as a whole with the specific net element of Appellant's claims in order to make the claimed combination. This important difference applies to all of the claims on appeal, and cannot be overstated. Neither Chat, nor Bryant nor Caddis teach or suggest providing a flexible length measuring scale on a flexible net portion of a fish net device having a frame. Consequently, the cited references when combined do not teach all elements of any of the Appellant's claims.

C. There is No Reasonable Expectation of Success in Combining Chat with Bryant or Caddis.

Even if the Examiner's arguments regarding the motivation to combine the teachings of Chat with Bryant or Caddis are accepted, whatever combination could be made would not produce a fish net device having a flexible length measuring scale disposed upon a flexible net attached to the hoop portion of a frame and having the other limitations of the cited claims. Indeed, such combinations would not produce a functional device of any kind. For at least this reason the Examiner's assertions of obviousness must be overturned.

In Bryant a fish can be held in the net 28, which forms a pocket, but cannot be measured when so doing, and in Chat a fish is to be held in the gutter for measurement, but apparently not for any other purpose. Thus, the combination of the two references cannot suggest measuring a fish while holding it in a net. The combination of Bryant and Chat would produce a sport fishing net with a rigid gutter attached to the side of the net portion, which would be unusable. Additionally, the configuration shown in FIG. 3 of Bryant, cited by the Examiner, is a non-

functional configuration intended for storage of that device, not its use. Thus the device of Bryant is non-functional when configured as in FIG. 3, and therefore no combination of Bryant with Chat is suggested by that figure, and such a combination would be non-functional in any event.

The supposed combination of Chat with the Caddis catalog reference would likewise be non-functional. The combination of Caddis with Chat in the manner suggested by the Examiner would produce a substantially planar net material with length markings on it, separate from a rigid gutter that is attached to the planar net. This would be non-functional because one could not measure a fish in the gutter according to the teachings of Chat.

The Examiner has not presented any other specific discussion in the Examiner's Answer of the Appellant's arguments with respect to the rejections of claims 5-10, 13-14, 16-17, 20-21 and 24. To the extent that the Examiner has presented no arguments or unpersuasive arguments as noted here and in the Appellant's Appeal Brief, the Appellant submits that the Examiner has thus conceded on these claims.

3. The Appellant's Secondary Considerations in Combination With Other Factors Support Allowance.

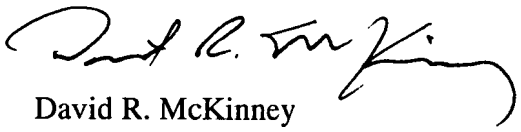
The affidavit previously submitted by the Appellant provides sales figures for a new product with no direct competition, and therefore implicitly suggests a nexus between the claimed features of the invention and the increasing sales. Appellant submits that the sales of Appellant's products, taken in conjunction with the lack of directly competing products, and the arguments presented in this Brief and in previous papers, attests to the public acceptance and commercial success of these products, and supports a conclusion that this commercial success is a result of the novelty and non-obviousness of the invention.

CONCLUSION

In view of the above, the Appellant respectfully requests the Board to overturn the Examiner's rejection and allow all pending claims.

DATED this 10th day of October, 2007.

Respectfully submitted,



David R. McKinney
Attorney for Appellants
Registration No. 42,868

Customer No. 22,147
P.O. Box 1460
Sandy, Utah 84091
Telephone: (801) 748-1450